

Claimant contends Judge Nodgaard erred. Claimant argues she also permanently injured her left upper extremity and, consequently, she now has a 10 percent impairment

to her left upper extremity. Therefore, claimant requests the Board to modify the February 20, 2007, Award by also granting her permanent disability benefits for a 10 percent left upper extremity impairment.

Respondent and its insurance carrier also contend Judge Nodgaard erred. They ask the Board to reduce the 25 percent functional impairment rating for the right upper extremity to 10 percent. In addition, they contend claimant does not have any permanent impairment to her left upper extremity and, therefore, her request for permanent disability benefits for that upper extremity should be denied.

The only issue before the Board on this appeal is the extent of claimant's permanent impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the February 20, 2007, Award should be modified.

Respondent, an independent insurance agency in Oswego, Kansas, employed claimant as its agency manager. In that position, claimant sold all types of insurance products. Claimant began working for respondent in 1989 and contends that over the years she sustained repetitive traumas to her upper extremities from performing her office duties, which included a significant amount of data entry. The parties stipulated claimant sustained personal injury by accident arising out of and in the course of her employment with respondent.

In 2001, after reporting to respondent that she had pain and numbness in her hands, respondent referred claimant to Dr. Veitch, an orthopedic surgeon. An EMG was performed that indicated claimant had mild bilateral carpal tunnel syndrome (left worse than right). Dr. Paul Toma began treating claimant after Dr. Veitch's retirement. And in June 2002, Dr. Toma reconstructed the basal joint in claimant's right thumb and the doctor also performed a carpal tunnel release on her right hand.

When claimant's symptoms did not resolve, claimant sought a second opinion from Dr. Lynn D. Ketchum, who eventually took over claimant's treatment. Dr. Ketchum, who specializes in plastic surgery and hand surgery, first saw claimant in August 2003 and had nerve conduction studies performed. Those studies, which were performed on both arms in August 2003, did not show evidence of carpal tunnel syndrome. Consequently, the doctor did not think carpal tunnel surgery was indicated on either arm, but he did recommend additional surgery on claimant's right thumb.

In September 2003, at claimant's request Dr. Ketchum rated claimant and determined she had a 20 percent permanent impairment to her right upper extremity for residual osteoarthritis of the right wrist at the base of the first metacarpal and thoracic outlet syndrome. The doctor also rated claimant as having a 10 percent left upper extremity impairment for thoracic outlet syndrome. Those ratings were formulated under the fourth edition of the *AMA Guides*¹.

After that rating, however, Dr. Ketchum operated on claimant's right thumb. Accordingly, in April 2004 the doctor removed the bone spur that was impinging on claimant's scaphoid carpal bone. The doctor followed claimant post-operatively in both June and September 2004. In November 2004, Dr. Ketchum again rated claimant. At that time, Dr. Ketchum rated claimant as having a 10 percent impairment to her right upper extremity for the right thumb injury, which was actually an 11 percent right upper extremity impairment as measured by the *AMA Guides*. Moreover, the doctor indicated claimant remained impaired from the thoracic outlet symptoms in both upper extremities. Although the record is not entirely clear, it appears as of November 2004 Dr. Ketchum continued to believe claimant had a 10 percent impairment to both upper extremities from the bilateral thoracic outlet syndrome.

At her attorney's request, claimant saw Dr. Edward J. Prostic in December 2004, which was the first of two visits. At that time, claimant was having more complaints in her right hand than her left. The doctor found claimant had good results from the right carpal tunnel decompression and substantial improvement in her right thumb from surgery. But Dr. Prostic found claimant continued to have carpal tunnel syndrome in the left arm and mild left thoracic outlet syndrome. Accordingly, the doctor recommended left carpal tunnel release surgery. And for her thoracic outlet syndrome, the doctor thought that condition would respond to exercises.

Claimant returned to Dr. Ketchum in February 2005, which was the last time the doctor examined her. Because of her concerns regarding left carpal tunnel syndrome, Dr. Ketchum had claimant undergo a nerve conduction study on her left arm. But the study yielded normal results. Dr. Ketchum determined, however, claimant continued to have residual bilateral thoracic outlet syndrome symptoms and she needed to resume her exercises.

Claimant's next medical examination occurred in November 2005, when she saw Dr. Prostic for the second and final time. Regarding the left arm, claimant had negative tests for both thoracic outlet syndrome and cubital tunnel syndrome. Nonetheless, the doctor found both mild cubital tunnel syndrome and mild carpal tunnel syndrome in the left

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

arm. Regarding the right arm, Dr. Prostic found no evidence of thoracic outlet syndrome. But he did find mild cubital tunnel syndrome.

Using the fourth edition of the *AMA Guides*, Dr. Prostic rated claimant as having an 11 percent impairment to the right upper extremity for her basal joint disease and a 15 percent impairment for cubital tunnel syndrome, which combine to create a 25 percent impairment to the right upper extremity. For the left upper extremity, the doctor found claimant sustained a 10 percent impairment for the cubital tunnel syndrome.

These facts highlight the difficulties and honest differences of opinion that sometimes occur when attempting to diagnose and rate repetitive trauma injuries. Drs. Ketchum and Prostic have different diagnoses and different functional impairment ratings. Dr. Prostic rated claimant as having a 25 percent impairment to the right upper extremity and a 10 percent impairment to the left upper extremity. Dr. Ketchum, however, rated claimant as having a 20 percent impairment to the right upper extremity and a 10 percent impairment to the left upper extremity, assuming she continues to have thoracic outlet syndrome. Assuming claimant does not have thoracic outlet syndrome, Dr. Ketchum rates claimant as having a 10 percent right upper extremity impairment and having no impairment to the left upper extremity.

Considering the various medical opinions, claimant has a functional impairment to her right upper extremity that ranges from 11 to 25 percent and a functional impairment to her left upper extremity that ranges from zero to 10 percent. The Board finds this record fails to establish that one medical opinion is any more accurate or persuasive than another. Consequently, the Board averages the ratings and finds that claimant has sustained an 18 percent impairment to her right upper extremity and a five percent impairment to her left upper extremity.

As held by *Casco*², when a worker has experienced a loss in both eyes, hands, arms, feet or legs, or any combination thereof, there is a presumption the worker is permanently totally disabled. If that presumption is rebutted, however, the worker receives permanent disability benefits for two injuries under the schedules of K.S.A. 44-510d.

Claimant has returned to work. Consequently, the presumption that claimant is permanently totally disabled is rebutted. Therefore, claimant is entitled to receive disability benefits under K.S.A. 44-510d for an 18 percent impairment to her right upper extremity and a five percent impairment to her left upper extremity.

² *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.³ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the February 20, 2007, Award entered by Judge Nodgaard.

Linda K. Gallagher is granted compensation from Commercial Insurance and its insurance carrier for a June 14, 2002, accident and resulting disability to her right arm. Based upon an average weekly wage of \$1,423.32, Ms. Gallagher is entitled to receive 10.59 weeks of temporary total disability benefits at \$417 per week, or \$4,416.03, plus 35.89 weeks of permanent partial disability benefits at \$417 per week, or \$14,966.13, for an 18 percent permanent partial disability to the right arm, making a total award of \$19,382.16, which is all due and owing less any amounts previously paid.

In addition, Linda K. Gallagher is granted compensation from Commercial Insurance and its insurance carrier for a June 14, 2002, accident and resulting disability to her left arm. Based upon an average weekly wage of \$1,423.32, Ms. Gallagher is entitled to receive 10.5 weeks of permanent partial disability benefits at \$417 per week, or \$4,378.50, for a five percent permanent partial disability to the left arm, making a total award of \$4,378.50, which is all due and owing less any amounts previously paid.

Although the Special Administrative Law Judge's Award places a lien against the award in the amount of 25 percent in favor of claimant's attorney, the record does not contain a written fee agreement between claimant and her attorney. K.S.A. 44-536(b) requires the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee in this matter, counsel must submit the written agreement to the Judge for approval.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

³ K.S.A. 2006 Supp. 44-555c(k).

Dated this ____ day of June, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Crystal D. Marietta, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge
John Nodgaard, Special Administrative Law Judge